Supreme Court, U.S.
FILED

931478 MAR 15 1994

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DONALD G. ANDERSON, WILLIAM K. POPELKA, and GARY MUELLER,

Petitioners,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Donald Harris
Crowley, Haughey, Hanson, Toole & Dietrich
P. O. Box 2529
Billings, MT 59103

(406) 252-3441
Attorneys for Petitioners

Patricia Price
U.S. Merit Systems Protection Board
1120 Vermont Ave. N.W., Suite 816
Washington, DC 20419
(202) 653-7171
Attorneys for Respondent

25 pp

QUESTIONS PRESENTED

1. Whether the Merit Systems Protection Board had jurisdiction to determine whether the Petitioners, as Veterans Readjustment Act (VRA) appointees, were unlawfully terminated?

2. Whether VRA appointees can be deprived of their interests in continued employment with the General Services Administration (GSA) without an administrative hearing or any other opportunity to present their claims?

3. Whether the Civil Service Reform Act (CSRA) violates due process guarantees if its application deprives federal employees of any forum in which to present constitutional claims?

PARTIES TO THE PROCEEDING BELOW

The Petitioners sought review to the Merit Systems Protection Board (MSPB) of the wrongful termination of their employment with the General Services Administration (GSA). The MSPB held that it had no jurisdiction and dismissed the case. That decision was affirmed by the United States Court of Appeals for the Federal Circuit.

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The Petitioners respectfully request that this Court grant a petition for writ of certiorari, seeking review of

the judgment and opinion of the United States Court of Appeals for the Federal Circuit.[1]

DECISIONS BELOW

	Appendix
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Anderson, Popelka and Mueller v. General Services Administration, MSPB Docket No. DE344392045II1, Opinion and Order (January 29, 1993)	12-20
Anderson, Popelka and Mueller v. Eric Lee and the General Services Administration, United States District Court for the District of Montana, Cause No. CV 92-48-BLG, Memorandum and Order (June 18, 1992)	21-34

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1 The Petitioners have also filed, contemporaneously herewith, a petition for writ of certiorari, seeking review of a conflicting judgment and opinion from the United States Court of Appeals for the Ninth Circuit. Both petitions are related and present the same issues.

	Appendix
Anderson, Popelka, and Mueller v. Eric Lee and the General Services Administration, United States District Court for the District of Montana, Cause No. DV 92-48-BLG, Order (August 26, 1992)	35-37
Anderson, Popelka and Mueller v. Jim O'Keefe; United States General Services Administration, No. 92-36700, Memorandum Op. (9th Cir. Feb. 11, 1994)	38-43

JURISDICTION

The United States Court of Appeals for the Federal Circuit had jurisdiction under 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9), which gave that Court exclusive jurisdiction over an appeal from a final decision of the Merit Systems Protection Board. The Federal Circuit entered judgment in this case on December 16, 1993. See Appendix 1-11. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

38 U.S.C. § 4214(a)(1) provides as follows:

> The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life since veterans, by virtue of their military service, have lost opportunities to pursue education and training oriented toward civil careers. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a major recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam era and of the post-Vietnam era who are qualified for such employment and advancement.

38 U.S.C. § 4214(b)(1)(E) provides as follows:

> [A] veteran given an appointment under the authority of this

> subsection whose employment under the appointment is terminated within one year after the date of such appointment shall have the same right to appeal that termination to the Merit Systems Protection Board as a career or career-conditional employee has during the first year of employment.

STATEMENT OF THE CASE

During late 1989 and early 1990, three of the eight full-time custodial positions at the Federal Building in Billings, Montana became vacant. The GSA sought to fill those vacancies with Vietnam combat veterans who were preference eligible under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. The three Petitioners were the only applicants who qualified for VRA appointments.[2] As the three custodial vacancies constituted full-time positions, the GSA was prohibited by its own written personnel policies from filling those positions with "temporary" employees.

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2 By statute, custodial positions with the Government are specifically restricted to preference eligible employees. See 5 U.S.C. § 3310. The three custodial vacancies involved here had previously been filled by permanent VRA appointees.

The three Petitioners were subsequently hired by the GSA to fill those three full-time custodial vacancies. The Petitioners were explicitly informed and the GSA affirmatively led them to believe that their custodial jobs with the GSA were VRA appointments, and that they could not be terminated except for reasons related to job performance. Despite the fact that they performed their custodial work in an exemplary manner, and received salary increases and monetary bonuses in recognition of their excellent job performances, the GSA nonetheless notified the Petitioners, shortly before their two-year anniversary dates, that they would be terminated from their positions. The notices provided the Petitioners with no reason for their terminations, other than, in the view of the GSA, they were "temporary" employees.

On February 27, 1992, the Petitioners instituted an action in United States District Court for the District of Montana seeking preliminary injunctive and mandamus relief. The Petitioners subsequently amended their Complaint to allege, in addition to a constitutional tort

claim, that the GSA was equitably estopped from contending that they were other than VRA appointees, and sought declaratory relief to that effect. In granting the Government's motion to dismiss for lack of jurisdiction, the district court cited the MSPB as the appropriate forum for Petitioners' complaints. See Appendix 33.

The Petitioners filed a motion for relief from the district court's judgment. In that motion, the Petitioners' attorneys notified the district court that they had contacted the Office of Special Counsel (OSC) for the MSPB, and had been informed that the MSPB would not assert jurisdiction over their claims. See, e.g., Cinnamon v. FAA, 10 MSPR 598 (1982). It was argued, therefore, that unless the district court exercised jurisdiction in this matter, the Petitioners would be deprived of a forum in which to present their claims. The district court denied the motion. See Appendix 35-37.

The Petitioners then sought review by the MSPB, and the Government again moved to dismiss for lack of jurisdiction. The MSPB held that it had jurisdiction to

review agency decisions to terminate "employees" as that term is defined in 5 U.S.C. § 7511(a)(1), but that because the GSA had designated the Petitioners "temporary" on their SF-50 forms, they were not employees over whom the MSPB had jurisdiction. See Appendix 15-17.

The Petitioners appealed the MSPB's decision to the United States Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). The Federal Circuit affirmed the MSPB ruling that it had no jurisdiction of the Petitioners' claims. See Appendix 1-11. In so doing, however, the Federal Circuit strongly indicated that the Petitioners should be entitled to some forum in which to present their grievances:

> It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these Petitioners to redress; the question is only whether, if redress is to be sought, Congress has authorized the MSPB to provide it.

Appendix 10 (emphasis added).

During the course of appealing the MSPB ruling to the Federal Circuit, the Petitioners were similarly appealing the dismissal judgment of the United States District Court for the District of Montana to the U.S. Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1291. The Ninth Circuit affirmed the district court's dismissal of Petitioners' claims for lack of jurisdiction. See Appendix 38-43. In its memorandum decision, however, and contrary to the decision which had previously been rendered by the Federal Circuit Court of Appeals, the Ninth Circuit indicated in a footnote that the MSPB would have jurisdiction over Petitioners' claims. See Appendix 42-43 n.2.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit Court of Appeals Has Rendered a Decision Which Directly Conflicts with a Subsequent Decision of the Ninth Circuit Court of Appeals on the Same Matter.

Relying exclusively upon the "temporary" designation which the GSA had inappropriately inserted on Petitioners' SF-50 forms, the MSPB determined that it lacked jurisdiction over their claims.[3] The Petitioners timely appealed that decision. Pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9), the U.S. Court of Appeals for the Federal Circuit had exclusive jurisdiction over appeals from final decisions of the MSPB. Although it strongly indicated that some forum should be made available, the Federal Circuit conclusively determined in a published opinion that the MSPB had no jurisdiction to address the Petitioners' claims. A copy of the Federal Circuit's opinion was provided by the

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3 Such reliance was wholly inappropriate. In Grigsby v. U.S. Dept. of Commerce, 729 F.2d 772, 776 (Fed.Cir. 1984), the Federal Circuit determined that "the SF-50 is not a legally operative document controlling on its face an employee's status and rights."

Petitioners to the U.S. Court of Appeals for the Ninth Circuit.

Despite the clear decision by the Federal Circuit that the MSPB lacks jurisdiction in this matter, the Ninth Circuit decided that jurisdiction over Petitioners' claims would be proper with the MSPB.[4]

Consequently, there are decisions rendered by two U.S. Courts of Appeal on the very same jurisdictional matter which are directly contrary to one another. The Federal Circuit says that the MSPB lacks jurisdiction over Petitioners' claims, and the Ninth Circuit disagrees. On

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4 The Ninth Circuit opined that the Petitioners' grievances sounded in the nature of "prohibited personnel practices," and that the Office of Special Counsel (OSC) was authorized to bring such actions before the MSPB. See Appendix 42-43 n.2 The Government had made this very same argument to the Federal Circuit during the course of the Petitioners' appeal there from the MSPB dismissal. The Petitioners pointed out that, like any other party, the OSC has the burden of establishing MSPB jurisdiction, see, e.g., Special Counsel v. Peace Corp, 31 MSPR 225 (1986); Acting Special Counsel v. Dept. of Treasury, 6 MSPR 140 (1981), and that 5 U.S.C. § 2302(b) does not provide an independent source of MSPB jurisdiction. See Wren v. Department of the Army, 2 MSPR 1, 2 (1980), aff'd, 681 F.2d 867, 871-73 (D.C.Cir. 1982). Thus, while obviously aware of the procedures by which claims can be pursued to the MSPB by the OSC, the Federal Circuit nevertheless determined that the MSPB simply does not have jurisdiction in this matter.

this basis, and pursuant to Rule 10 of the Rules of the Supreme Court, an exercise of this Court's power of supervision is clearly warranted.

B. The Petitioners are Entitled as a Matter of Due Process to a Forum in Which to Present Their Grievances.

The Petitioners are undoubtedly entitled to present their grievances to some administrative or judicial forum. Even the conflicting decisions from the two U.S. Courts of Appeal involved here would seemingly agree on that fundamental aspect of due process. The problem here, however, is that every administrative agency or court in which the Petitioners have sought redress has denied them a forum.

As the Petitioners have alleged throughout this case, they were informed and the GSA affirmatively led them to believe that they had been appointed to their custodial positions under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. As VRA appointees, the Petitioners were serving a probationary period which,

after two years of substantially continuous service, the GSA was required to convert to permanent career positions. See 5 C.F.R. § 315.705(a)(2). The GSA is required to utilize this probationary period to determine an employee's fitness for continued employment, see 5 C.F.R. § 315.803, and is prohibited from terminating an employee during that time except for unsatisfactory performance or conduct. See 5 C.F.R. § 315.804. Moreover, VRA appointees are statutorily entitled to appeal their terminations to the MSPB. See 38 U.S.C. § 4214(b)(1)(E).

It has been well settled for over two decades that an individual may have a property interest in government employment protected by the fifth amendment. See Board of Regents v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). To have a property interest in government employment, the employee must be able to demonstrate an entitlement to the job. Entitlements arise from "'rules or understandings' from independent sources, such as statutes, regulations, and

ordinances, or express or implied contracts." Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983)(quoting Board of Regents v. Roth, 408 U.S. at 577). To find an entitlement to a job based on an "understanding," the understanding must be "mutually explicit," and may be implied from "the [defendants'] words and conduct in the light of the surrounding circumstances." Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Whether or not such an understanding exists "will frequently turn on factual questions." Roth v. Veteran's Administration, 856 F.2d 1401, 1409 (9th Cir. 1988)(citing Orloff v. Cleland, supra, 708 F.2d at 377).[5]

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5 The Supreme Court has established that even as probationary employees, the Petitioners could still have property interests in their custodial jobs if they had expectations of continued employment. See Board of Regents v. Roth, supra, 408 U.S. at 577(citing Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971)(holding that teacher without tenure enjoyed due process rights). See also Orloff v. Cleland, supra, 708 F.2d at 377 (remanding to district court for findings on existence of mutually explicit understanding that part-time VA employee had expectation of continued employment).

The Petitioners have continuously alleged in every administrative and judicial tribunal in which they have sought redress, that the GSA's conduct and treatment of them and other custodial employees, their salary increases and monetary bonuses for exceptional job performances, and discussions with their supervisors all created a mutually explicit understanding of continued employment. See, e.g., Orloff v. Cleland, supra, 708 F.2d at 377 (prior treatment of plaintiffs and other VA employees may give rise to mutual understanding sufficient to constitute a *de facto* property interest). If there was such an understanding, the Petitioners had a clearly established right to retain their jobs pursuant to that understanding, unless the GSA provided them with due process. At the very least, and in light of the Petitioners' allegations, they are clearly entitled to a hearing so that the merits of their claims can be addressed:

> In this case, the respondent has alleged the existence of rules and understandings . . . that may justify his legitimate claim of entitlement to continued employment absent

> "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement . . .

Perry v. Sindermann, supra, 408 U.S. at 602-03 (emphasis added).

The problem in this case, of course, is that the Petitioners have not been given the opportunity to prove their claim of entitlement to continued employment. Every administrative and judicial forum to which they have turned have refused them jurisdiction. Consequently, as such rulings have deprived the Petitioners of their right to pursue their due process claims, an exercise of the Supreme Court's power of supervision in this matter is mandated.[6]

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6 The Supreme Court has never held that the administrative scheme created by the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978)(codified, as amended, in various sections of 5 U.S.C.) can operate to deprive federal employees of any forum in which to present employment-related claims. See Bush v. Lucas, 462 U.S. 367, 391, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)("[T]here is nothing in today's decision to foreclose a federal employee

CONCLUSION

The Petitioners have been deprived of their interest in continued employment with the GSA by a scheme which can only be characterized as fraudulent. They have attempted to seek redress in a federal district court, in the Merit Systems Protection Board, and in two federal Circuit Courts of Appeal. Although recognizing that a forum should be available, none of these courts or administrative agencies will provide the Petitioners with jurisdiction.

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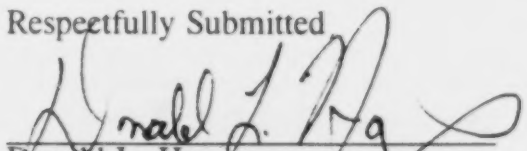
from pursing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the [CSRA]") (Marshall, J. concurring); United States v. Fausto, 484 U.S. 439, 455, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988)(implying that a federal employee could maintain a *Bivens* action despite the CSRA under certain circumstances)(Blackmun, J., concurring); see also Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991)("No Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing *Bivens* actions to right job-related wrongs"). Indeed, and as the Supreme Court has steadfastly recognized, "'serious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988)(citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986))(emphasis added).

Based on the foregoing, the Petitioners respectfully request that this Court grant the petition for writ of certiorari and resolve this jurisdictional dilemma. If this jurisdictional dilemma is not resolved, the GSA will obviously continue to violate with impunity the rights of other federal employees, knowing that such employees will never be able to seek redress. In the alterative, and should the CSRA operate to deprive federal employees of a forum in which to present colorable constitutional claims, the Act should be declared unconstitutional.

Respectfully Submitted



Donald L. Harris
CROWLEY, HAUGHEY, HANSON
TOOLE & DIETRICH
P.O. Box 2529
Billings, MT 59103-2529
(406)252-3441
Attorneys for Petitioners

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Donald Harris
Crowley, Haughey, Hanson, Toole & Dietrich
P. O. Box 2529
Billings, MT 59103

(406) 252-3441
Attorneys for Petitioners

Patricia Price
U.S. Merit Systems Protection Board
1120 Vermont Ave. N.W., Suite 816
Washington, DC 20419
(202) 653-7171
Attorneys for Respondent

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United States Court of Appeals for the Federal Circuit

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MERIT SYSTEMS PROTECTION BOARD,

Respondent.

DECIDED: December 16, 1993

Before RICH, NEWMAN and PLAGER, ***Circuit Judges***

PLAGER, ***Circuit Judge***.

This is an appeal from a final decision[1] of the Merit Systems Protection Board, dismissing for lack of jurisdiction a petition for review of an agency decision to remove employees. We ***affirm*** the decision of the Board.

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[1] In its decision of January 29, 1993, the full Board denied the petition for review, reopened the appeal under its own motion, and affirmed as modified the initial decision of October 1, 1992, Dkt. Nos. DE3443920451-I-1, DE3443920450-I-1, DE3443920452-I-1.

BACKGROUND

Anderson, Popelka, and Mueller were employees of the Government's General Services Administration (Government), custodians of the Federal Building in Billings, Montana. Petitioners are all combat veterans of the Vietnam War, and are eligible for appointment under the Veterans Readjustment Act (VRA). In 1990, petitioners were hired as temporary employees pursuant to 5 C.F.R. § 316.402(b).[2] The term of each appointment was one year. Anderson, Mueller, and Popelka began work on October 9, March 26, and April 30, 1990, respectively. Their appointments were renewed in 1991. Petitioners claim to have thought that their appointments were not "temporary" but were VRA appointments -- after two years of service, a VRA appointee receives a protected position within the competitive system of federal employment. 5 C.F.R. §§ 307.101(e), 315.705(a)(2).

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2 All citations to the Code of Federal Regulations are to the 1993 edition. All citations to the U.S. Code are to the 1988 edition.

By memorandum dated January 22, 1992, petitioners were notified that they would be terminated effective February 28, 1992. Upon learning of their proposed termination, petitioners sought and received a temporary restraining order in United States District Court for the District of Montana staying their removal. The Government moved to dismiss based on lack of jurisdiction. In granting the motion to dismiss and lifting the order, the district court cited the Merit Systems Protection Board (MSPB or Board) as the appropriate forum for petitioners' complaints.[3]

Petitioners were terminated June 27, 1992. Petitioners then sought review by the MSPB. The Government again moved to dismiss for lack of jurisdiction. In an initial decision dated October 1, 1992, an Administrative Judge (AJ) dismissed the petition for review, ruling that the MSPB had no jurisdiction over termination of temporary term-limited appointments. In a

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[3] The decision of the district court is currently on appeal to the Ninth Circuit.

final decision dated January 9, 1993, the full Board upheld the dismissal. The Board disagreed with the AJ to the extent the AJ had held that the MSPB had no jurisdiction over appeals by temporary employees. The Board held that it had jurisdiction to review agency decisions to terminate "employees" as that term is defined by 5 U.S.C. § 7511(a)(1), which includes certain temporary employees. The Board held that on the facts of this case these petitioners were not employees over whom the MSPB had jurisdiction under the statute. Petitioners appeal to this court.

DISCUSSION

The burden of establishing that the MSPB has jurisdiction over their appeal is upon petitioners. 5 C.F.R. § 1201.56(a)(2)(i). The gravaman of petitioners' appeal to the MSPB is that they understood their appointments to be VRA appointments, and that their positions would become protected positions in the competitive service. Thus they were misled into accepting their appointments as temporary employees.

Section 7513(d) of the U.S. Code Title 5 gives the MSPB subject matter jurisdiction over agency decisions to remove an employee. An "employee" is defined as

> an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment **under other than a temporary appointment limited to 1 year or less**.

5 U.S.C. § 7511(a)(1)(A)(emphasis supplied). Petitioners were hired on a one year temporary basis pursuant to the Code of Federal Regulations:

> (b) *Noncompetitive temporary limited appointments*. An agency may give a **noncompetitive temporary limited appointment** without regard to the existence of an appropriate register to an individual in one of the categories set out below.
>
> . . . .
>
> (4) Any veteran who meets the qualifications for a veterans readjustment appointment is eligible for employment under this paragraph.

5 C.F.R. § 316.402 (emphasis supplied).

Petitioners were aware of the temporary character of their appointments. The SF-50 forms with which they were hired plainly stated that the positions they held were temporary. Petitioners also must have known that they were receiving fewer benefits, notably health care, than employees in the competitive service.

Petitioners do not deny that they were employed as temporary employees with one year appointments, but contend that the Government's misconduct in appointing them estops the Government from denying that they are protected employees within the competitive service. In essence, petitioners contend that they are employees in the competitive service by judicial construction, and therefore that the MSPB has subject matter jurisdiction over the decision to terminate them.

Petitioners argue that the MSPB is authorized to examine the Government's determination of employee status. In ***Grigsby v. United States Dep't of Commerce***, 729 F.2d 772 (Fed. Cir. 1984), the official record of

employment, the SF-50, establishing Grigsby's status was wrong due to a clerical error. This court held that the appointment paper is "not a legally operative document controlling on its face an employee's status and rights." ***Id***. at 776. In that case, the Government was able to show that Grigsby did not have the employment status indicated by the form.

In this case, petitioners use ***Grigsby*** to argue that the employment status shown on their SF-50 forms does not preclude their equitable estoppel argument. In ***Grigsby***, however, the SF-50 did not accurately reflect the Government's intention with regard to employment status. Here, it is conceded, the Government's intention is accurately reflected in the SF-50; it is the propriety of the Government's intention that is at issue, not the correctness of the record of its intention.

Petitioners present no evidence that the form was incorrect, and that they are not in fact temporary appointees. In making their estoppel argument, petitioners assert just the opposite: that although appointed

as temporary employees, their status was based on Government deception. Petitioners in effect argue that, while facially accurate, the SF-50 form is not legally controlling, leaving the MSPB, or this court, free to invent theories of jurisdiction. Even if the petitioners' argument from ***Grigsby*** were accepted, it provides no affirmative support for petitioners' basic contention that MSPB jurisdiction may be derived from Government misconduct in the initial employment decision.

Petitioners quote a plethora of cases to show that the doctrine of equitable estoppel applies to the Government. Although estoppel is often mentioned in dicta, the cases that actually estop the Government are few and far between. Petitioners' best case, ***Watkins v. United States Army***, 875 F.2d 699 (9th Cir. 1989), concerned the employment status of a homosexual soldier in the U.S. Army. The court's jurisdiction to hear Watkins's case, however, was not based on his employment status. Nor was Watkins's standing to sue at issue. In short, Watkins had an authoritative forum in

which he could argue the doctrine of estoppel. In the present case, in contrast to ***Watkins***, it is precisely these threshold requirements of jurisdiction and standing that are contested, and that petitioners seek to satisfy through estoppel arguments. Petitioners place the cart before the horse. Estoppel requires a forum; it cannot be used to build a forum.[4]

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[4] Petitioners' case is readily distinguished from cases in which an employee resigns from a protected position in the competitive service but later alleges the resignation was involuntary. Although as a general proposition resignation is presumed to be voluntary, and the MSPB has no authority to review loss of employment due to voluntary resignation, ***Schultz v. United States Navy***, 810 F.2d 1113, 1135-36 (Fed.Cir. 1987)(citation omitted), "[i]f however, the employee can demonstrate that the resignation was involuntary, then it must be treated as an adverse action, which invokes the [Civil Service Reform] Act, allowing the employee to appeal to the Board (and ordinarily entitling him to reinstatement and back pay)." ***Latham v. United States Postal Serv.***, 909 F.2d 500, 502 (Fed. Cir. 1990) (citation omitted). ***See also Scharf v. Dep't of the Air Force***, 710 F.2d 1572, 1574 (Fed. Cir. 1983); ***Burgess v. Merit Sys. Protection Bd.***, 758 F.2d 641, 643 (1985) "an involuntary resignation is a removal." Thus, an employee in the competitive service who is found to have involuntarily resigned from a protected position has a right to MSPB review under 5 U.S.C. §§ 7512(1), 7513(d) (1988). This court has held, in short, that involuntary resignation is removal, and removal does not strip an employee of the right to MSPB review of the decision to terminate. ***See Covington v. Dep't of Health & Human Servs.***, 750 F.2d 937, 944 (1984). In this case, in contrast, the Government took actions allegedly adverse to job applicants, persons who did

It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these petitioners to redress; the question is only whether, if redress is to be sought, Congress has authorized the MPSB to provide it. Petitioners seek MSPB review of an agency action that they concede is unreviewable by the MSPB on a plain reading of the statute. For this court to hold for petitioners would improperly broaden the scope of MSPB authority to include equitable review of agency appointment processes.

At the district court, petitioners were dismissed for lack of jurisdiction in view of their failure to exhaust their administrative remedies. The district court reasoned that congress provided a comprehensive scheme of administrative review of agency employment policy under the Civil Service Reform Act of 1978, and concluded that it was inappropriate for the district court to interfere.

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not, prior to the alleged adverse action, hold a protected position in the competitive service.

This court affirms the MSPB ruling that it has no jurisdiction over the claims of these petitioners.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

AFFIRMED.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD G. ANDERSON, WILLIAM K. POPELKA, GARY R. MUELLER, Appellants,	DOCKET NUMBERS DE3443920451-I-1 DE3443920450-I-1 DE3443920452-I-1
v.	DATE: Jan 29, 1993
GENERAL SERVICES ADMINISTRATION, Agency.	

Harry. L. Dawson, American Federation of Government Employees, Fort Worth, Texas, for the appellants.

John M. Hewins, Esquire, Denver, Colorado, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellants have petitioned for review of an initial decision dismissing their appeals for lack of jurisdiction. For the reasons discussed below, we DENY

the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We REOPEN the appeals on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still dismissing the appeals.

BACKGROUND

The appellants, who were separated from positions in the competitive service, filed individual appeals of their separations. *See, e.g.*, Initial Appeal File (IAF) (*Anderson*), Tab 1; IAF, Tab 12, Subtabs 1-6. After providing them with an opportunity to show that the Board had jurisdiction over the appeals, and after consolidating the appeals, the administrative judge issued an initial decision dismissing the consolidated appeals as outside the Board's jurisdiction. *See, e.g.*, IAF (*Anderson*), Tabs 2, 7; IAF, Tab 13 (Initial Decision). In their petition for review, the appellants allege that the administrative judge erred in finding that the Board lacked jurisdiction over their appeals.

ANALYSIS

The administrative judge's finding that the Board lacked jurisdiction over the appellants' appeals appears to have been based on his belief that the Board lacked jurisdiction over any termination of a temporary appointment. *See* Initial Decision at 3 ("[t]he Board has long held that it is without jurisdiction to adjudicate the termination of a temporary term limited appointment"). We know of no basis for such a broad holding. While one of the decisions on which the administrative judge relied supports the proposition that a separation on the expiration date of an appointment does not constitute a removal appealable to the Board, *Soehngen v. Department of Justice*, 47 M.S.P.R. 169, 172 (1991),[1] that decision does not indicate that a separation before that date may not be appealed under any circumstances.[2]

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1 The other decision on which the administrative judge relied, *Dubose v. United States Postal Service*, 45 M.S.P.R. 252 (1990), concerns Board jurisdiction over agency denials of requests for the restoration of partially recovered employees. We see nothing in that decision that is relevant to this appeal.

2 An authority cited in that decision indicates that the reason a separation on the expiration of an appointment is not

For the reasons stated below, however, we concur in the administrative judge's conclusion that the Board lacks jurisdiction over the appellants' appeals.

First, we note that, under 5 U.S.C. §§ 7512(1) and 7513(d), the Board has jurisdiction over an appeal from the removal of an "employee," as that term is defined at 5 U.S.C. § 7511(a)(1). An individual in the competitive service is an "employee" if (1) he is not serving a probationary or trial period under an initial appointment and (2) he has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. 5 U.S.C. § 7511(a)(1)(A).

The appellants were employed in the competitive service, *see* IAF, Tab 12, Subtabs 1-6, and there is no indication in the record that any of them was serving a probationary or trial period at the time of his separation.

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appealable is that the separation simply carries out the terms of the appointment. *See Berger v. Department of Commerce*, 3 M.S.P.R. 198, 199-200 (1980), cited in *Soehngen*, 47 M.S.P.R. at 172.

Furthermore, the record indicates that each appellant had been continuously employed by the agency for more than a year when he was separated. *See* IAF, Tab 12, Subtabs 1-6. None of the appellants, however, has shown that he had a year of current continuous service other than service under a temporary appointment limited to a year or less. The service of appellant Anderson appears to have been performed entirely under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 1, 2, 8, 11; and, except for a period lasting well under a year, the service of the other two appellants was performed under two temporary appointments, each of them limited to 1 year, *see id.*, Subtabs 3-6, 9, 10, 12, 13.[3] We therefore

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[3] The record indicates that appellants Popelka and Mueller, each of whom received a 1990 appointment and a 1991 appointment, *see* IAF, Tab 12, Subtabs 3-6, were separated after the expiration dates of their 1991 appointments, *see id.*, Subtabs 4, 5, 9, 10, 12, 13. The absence of the usual forms documenting their employment immediately before their separations apparently is the result of a delay in their separations that was caused by a preliminary injunction granted by a U.S. district court at the appellants' request; the court dissolved the injunction less than 3 months later; shortly before the separations were effected. *See, e.g.*, IAF (*Popelka*), Tab 1 (court decision). Because the appellants were separated less than a year after their 1991 appointments

find that the appellants have failed to show that they met the definition of "employee" described above. *See Fish v. Department of the Navy*, 29 M.S.P.R. 595, 598 (1986).

In their petition for review, the appellants seem to allege that statements the agency made during a court proceeding concerning their separations are inconsistent with a finding that the Board lacks jurisdiction over their appeals.[4] Even if the agency stated or suggested that the Board would have jurisdiction over these appeals, however, such a statement or suggestion would not confer jurisdiction on the Board. *See Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 686 (1991).

The appellants also seem to be renewing their argument that the agency misled them into believing that

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expired, and because there is no evidence of any other employment that could be counted toward the year of current continuous service required under 5 U.S.C. § 7511(a)(1)(A)(ii), we need not determine whether service performed after the expiration of the 1991 appointments can be considered service under other than a temporary appointment limited to 1 year or less.

4 *See supra* at 4 n.3. After dissolving its preliminary injunction, the court dismissed the appellants' petition for judicial review. *See, e.g.*, IAF (*Popelka*), Tab 1.

their appointments would become permanent and that they had been appointed under the Veterans Readjustment Act. We note, however, that the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by statute or regulation. *See Shaw v. Department of the Navy*, 39 M.S.P.R. 586, 588 (1989). In the absence of evidence showing that the appellants met the criteria of 5 U.S.C. § 7511(a)(1)(A), we find that the Board has no jurisdiction over these appeals. *See* 5 C.F.R. § 1201.56(a)(2)(i) (an appellant has the burden of proving that the Board has jurisdiction over his appeal); *cf. Julius v. Department of the Army*, 35 M.S.P.R. 130, 133 (1987)(in the absence of an authorized appointment, an employee has no rights beyond those incident to the position to which he or she is officially appointed), *aff'd*, 852 F.2d 1293 (Fed.Cir. 1988)(Table).

Finally, because the Board has no jurisdiction over these appeals, it has no authority to review either the merits of the appellants' separations or the appellants' allegations of procedural error and prohibited personnel

practices. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982); *see also Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984)(an appellant has a right to a hearing on the merits only after Board jurisdiction has been properly invoked).

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your response to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER, and DON ANDERSON,	) Cause No.) CV 92-48-BLG-JDS
Plaintiffs,	)
vs.	)
ERIC LEE and THE GENERAL SERVICES ADMINISTRATION	) MEMORANDUM AND) ORDER
Defendants.	)

Plaintiffs William Popelka, Gary Mueller and Don Anderson move the Court to clarify or modify its March 23, 1992 preliminary injunction. In addition, both parties move for partial summary judgment on the issue of the plaintiffs' job status with defendants Eric Lee and Government Service Administration (collectively GSA). At present, an injunction preserves plaintiffs' employment status quo pending the implementation of administrative remedies.

BACKGROUND

During 1990, GSA hired these three plaintiffs to augment its custodial staff at the federal building in Billings, Montana. For each of the positions filled, GSA replaced a permanent, or permanent appointment, employee. Despite the fact that GSA had a continuing and permanent need for custodial employees to complete the tasks assigned to these plaintiffs, GSA hired them on a seemingly temporary basis. For each employee, GSA filed an SF-50 form setting forth the temporary nature of the appointment. Plaintiffs contend they were never apprised of their temporary status and that it violated several provisions of the Federal Personnel Manual. Nevertheless, shortly before their two-year anniversary date, GSA unceremoniously terminated the plaintiffs' jobs in order to subcontract the labor from an organization hiring only handicapped persons.[1]

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1 Known as the National Industry for the Severely Handicapped Workshop (NISH).

At the original injunction hearing, William Popelka testified that all three plaintiffs were led to believe GSA hired them under the **Veterans' Readjustment Act** (VRA), **38 U.S.C. § 1001 et seq.**, with an opportunity for permanent employment. This understanding was never memorialized in their SF-50 job status forms and GSA contends it never guaranteed any type of permanent employment. The essence of the factual controversy in this case revolves around whether GSA officials represented to the plaintiffs that they had permanent job status. Once a finder-of-fact determines the job status of plaintiffs, it must consider whether plaintiffs were wrongfully terminated.

On May 23, 1992, I issued a preliminary injunction preventing any job status change until plaintiffs had an opportunity to take advantage of administrative remedies. This injunction still controls this case and, in particular, prevents any further personnel action by defendants "until such time as the General Counsel takes action either accepting or denying this case." Order of

March 23, 1992, at 6. GSA recently notified the Court that the General Counsel has reviewed the case and filed an action. GSA now considers the Court's injunction to have lapsed by its own terms.

I predicated the injunction upon two findings: first, the plaintiffs raised serious questions of fact and law on the unfair labor practice and veterans' status issues; and, second, since no administrative process was available, the plaintiffs were threatened with irreparable injury by a complete lack of process or remedy. The General Counsel's recent complaint filed with the Federal Labor-Management Relations Board provides plaintiffs with some administrative process. Plaintiffs argue that this process does not satisfy their claims and leaves them with the continuing threat of irreparable injury.

GSA contends that the General Counsel's complaint changes the underlying jurisdictional basis for this action. Therefore, GSA asks the Court to re-examine its jurisdiction prior to entertaining further injunctive relief or reviewing the merits of the case. GSA argues, in

the alternative, that even should jurisdiction exist, the plaintiffs' claims fail to withstand summary judgment.

In their amended complaint, plaintiffs reiterate their requests for injunctive and mandamus relief, renew their due process challenge to the termination and add a claim of wrongful termination under the VRA. Their wrongful termination claim includes a prayer for declaratory relief. In their motion for partial summary judgment, plaintiffs request a declaration that they are VRA employees and that they are entitled to all of the benefits and protections afforded by the VRA and other applicable laws.

DISCUSSION

Both parties acknowledge that plaintiffs will have some cause of action at the administrative level. The General Counsel to the Federal Labor-Management Relations Board (FLRB) has filed a Federal Labor-Mangement Relations Act (FLRA) claim on behalf of plaintiffs, their union and other similarly situated

custodians. The complaint alleges an unfair labor practice pursuant to 5 U.S.C. § 7118.

Plaintiffs argue, however, that since this forum will not address their individual job status claims as VRA permanent appointees, this Court must retain jurisdiction of the case and issue a declaratory order deciding the job status issue. While GSA seems to concede plaintiffs' point that the FLRB will not address job status, it argues that the threshold issue of job classification is one properly decided by the Merit Systems Protection Board (MSPB), which has jurisdiction over "prohibited personnel action[s]" as defined in 5 U.S.C. § 2302. See, e.g., Houlihan v. Office of Personnel Management, 909 F.2d 383 (9th Cir. 1990). Therefore, GSA argues that Congress has removed this Court's jurisdiction because these statues provide a comprehensive remedy for all personnel action claims against federal agencies.

The MSPB serves as an important remedial cog in the **Civil Service Reform Act** (CSRA), **5 U.S.C. § 1101 et seq.** The Merit System ensures that federal employees

receive fair and equitable treatment "with proper regard for their privacy and constitutional rights," **5 U.S.C. 2301(b)(2)**, without being subject to arbitrary action and personal favoritism. **5 U.S.C. § 2301(b)(8)(A)**. It also ensures that "[e]mployees should be retained on the basis of the adequacy of their performance . . . ." **5 U.S.C. § 2301(b)(6)**.

To initiate a claim under the Act, an aggrieved employee must first present allegations of a "prohibited personnel practice" claim to the Office of Special Counsel. **5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A)**. Pursuant to statute and regulation, the Special Counsel must review the allegations and decide whether to proceed with an action before the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. There are limited instances where an employee may place a claim before the MSPB without proceeding through the Office of Special Counsel. For instance, plaintiffs, as permanent VRA employees, may also file a direct appeal with the MSPB as veterans pursuant to **5 U.S.C. § 7511(a)(1)(B)**.

Plaintiffs contend that these administrative avenues will not completely protect their rights as permanent VRA appointees. They cite several cases indicating that MSPB has no jurisdiction to hear the job status complaints of temporary employees. See Cinnamon v. FAA, 10 M.S.P.R. 598, 600 (1982); Hunter v. Dep't of Army, 40 M.S.P.R. 449 (1989). Plaintiffs urge this Court to hear their claims and resolve the job status issue. They rely upon dicta in Bush v. Lucas, 462 U.S. 367, stating that a **Bivens**-type claim may lie where an employee's injury is not attributable to a personnel action which may be remedied under the federal statutory scheme. Id. at 391 (Marshall, J. concurring).

Plaintiffs also rely on case law allowing a cause of action for promissory estoppel against the government. In Beacom v. Equal Employment Opp. Comm'n, 500 F.Supp. 428 (D. Ariz. 1980), the district court allowed an attorney to sue for permanent injunctive relief on the theory of estoppel. The government breached oral and written promises to appoint plaintiff to permanent service

with the government. Only after plaintiff abandoned his long-standing law practice did the government decide to breach. The court found that the government may be subject to estoppel if its actions amounted to "affirmative misconduct." Id. at 436. The court reinstated the attorney to his permanent position. Id. at 438-9.

Despite these authorities, however, plaintiffs here have remedies available through the administrative process. Even when considered temporary employees, they may file an original action with the Office of Special Counsel pursuant to **5 U.S.C. § 2302(a)(2)(B)**. This type of original action jurisdiction requires only that they present a question defined as a "prohibited personnel practice." **5 U.S.C. § 2302(a)**. Should the Special Counsel find that the complaint contains meritorious claims, it will be reviewed by the MSPB. **5 U.S.C. § 1212(a)(2)(A), 1214(b)**. Furthermore, if plaintiffs take a direct employee appeal under the VRA, any resulting final order, even one dismissing the case for lack of jurisdiction, is subject to judicial review in the circuit

court. Maddox v. Merit Systems Protection Board, 759 F.2d 9, 10 (D.C. Cir. 1985).

Although plaintiffs complain they are not guaranteed a forum for the issues raised in the complaint, this Court s jurisdiction does not hinge upon an exhaustive analysis of what claims might be received by the MSPB. Instead, district court jurisdiction depends upon the intent of Congress in establishing the civil service administrative appeals system.

The existence of district court jurisdiction in the government employment context was reviewed by the Ninth Circuit Court of Appeals in Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989), where plaintiff sued the government and his supervisors for demoting him from a probationary superior position. The Ninth Circuit Court of Appeals held that although the **Civil Service Reform Act** provided inadequate relief, the district court had no jurisdiction to supply a court-imposed remedy based upon Bivens v. Six Unknown Named Agents of the

Fed. Narcotics Bureau, 403 U.S. 388 (1971). The Court stated:

> Because Congress provided some mechanism for appealing adverse personnel actions, it cannot be said that the failure to provide damages, or complete relief, was "inadvertent." As a result, this court cannot imply a **Bivens** remedy.

This reluctance to allow district court jurisdiction to contravene the CSRA applies broadly to various forms of government employment issues. In Berry v. Hollander, 925 F.2d 311 (9th Cir. 1991), a VA doctor had his surgical privileges revoked and was allegedly driven from his job. The court noted that Congress has established a statutory scheme to handle VA personnel grievances. It held that "where Congress has provided some mechanism for relief, **Bivens** claims are precluded." Id. at 313 (citations omitted). The court declined to "upset the balance of interests struck by Congress" where the statutory system provided a "measure of relief." Id. at 314. The court held, "Although these remedies [under the

statutory scheme] do not guarantee full and independent compensation for constitutional violations . . . , they do indicate a Congressionally-authorized and comprehensive remedial scheme sufficient to preclude additional forms of relief." Id. at 315.

The court reaffirmed this holding in Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991) and, in doing so, stated:

> The CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights.

It added that the CSRA also preempts common law tort claims because Congress "left no room for them to operate." Id. at 843.

Plaintiffs raise a number of serious issues concerning their initial job status and GSA's attempt to terminate them. But this conclusion in itself cannot suffice as a source of jurisdiction. Congress has broadly

legislated this case and others like it into a comprehensive system of administrative review. I have no indication from any recent case law that Congresss created a job status exception to the CSRA administrative review system. On the other hand, the CSRA provides for administrative review of "prohibited personnel actions," which include appointment and removal decisions. **5 U.S.C. § 2302(a)(2)(A)**.

Plaintiffs may file a direct appeal of GSA's termination decision or they may avail themselves of the Office of Special Counsel, which may, in turn, file an action with the MSPB. The mere availability of these CSRA remedies serves as a "special factor counseling against recognition of a **Bivens** remedy for [plaintiffs]." Saul, 928 F.2d at 840. These same factors counsel against district court review of the estoppel claims. Estoppel claims against the government are subject to significant restrictions that do not apply in actions against private parties. See e.g., Heckler v. Community Health Services, 467 U.S. 51 (1984); Schweiker v. Hansen, 450

U.S. 380 (1947). By enacting the CSRA's comprehensive system of administrative review, Congress weighed the appropriate limitations upon promissory estoppel claims raised in employment appointment and hiring decisions. See Saul, 928 F.2d at 840, 843. To the extent that this cause of action is not available at the administrative level, it is preempted.

Based on the foregoing,

IT IS ORDERED that defendants' motion to dismiss on the basis of lack of jurisdiction is granted. **The Civil Service Reform Act** preempts all causes of action embodied in Counts I and II of the Amended Complaint. Therefore, plaintiffs' requests for mandamus relief, further injunctive relief, declaratory judgment, and compensatory damages are denied.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

DONE and **DATED** this 18th day of June, 1992.

Jack Shanstrom
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

WILLIAM POPELKA, GARY MUELLER and DON ANDERSON,	) Cause No.) CV 92-48-BLG-) JDS
Plaintiffs,	)
vs.	) **O R D E R**
ERIC LEE and the GENERAL SERVICES ADMINISTRATION,	)
Defendants.	)

Plaintiffs in the above-entitled litigation seek relief, pursuant to **Fed.R.Civ.P. Rule 60(b)**, from this Court's previous order of June 18, 1992. Upon careful review of the briefs and submitted documents, I am prepared to rule.

Plaintiffs argue that administrative remedies are non-existent, thus leaving this Court with no choice but to retain jurisdiction in order to avoid injustice. Such argument is based on a filed affidavit alluding to one

administrative agency's inability to hear the case. Such argument is further supported by copies of filed administrative claims.

Plaintiffs' assumptions regarding the "probable outcome" of the administrative claim does not affect this Court's previous order. Despite plaintiffs' assertions, all of the Court's original considerations concerning Congressional intent remain intact.

The jurisdiction vested in this Court is not dependent upon an analysis of the various administrative options that may or may not be available to plaintiffs. On the contrary, as stated in this Court's order of June 18, 1992, jurisdiction is founded upon Congressional intent in establishing the civil service administrative appeals system. This Court does not interpret Congressional intent as providing for jurisdiction in this case, in the face of the Congressionally created CSRA. See, generally, **Saul v. United States**, 928 F.2d 829 (9th Cir. 1991).

The assertion by plaintiffs that their proposed administrative claims may be unsuccessful does not permit

this Court to contradict Congressional intent and entertain jurisdiction. Plaintiffs simply have not provided the Court with any substantial or compelling reason to provide relief in accordance with **Rule 60(b)**.

Accordingly,

IT IS ORDERED that plaintiffs' motion for relief from the Court's June 18, 1992 order is denied.

DONE and **DATED** this 26th day of August, 1992.

Jack D. Shanstrom
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM POPELKA; GARY MUELLER, DON ANDERSON	) No. 92-36700) 92-36701)DC No. CV-92-) 48-JDS
Plaintiffs-Appellants,	)
v.	)
JIM O'KEEFE; UNITED STATES GENERAL SERVICE ADMINISTRATION	) MEMORANDUM*
Defendants-Appellees.	)

Appeal from the United States District Court for the District of Montana
Jack D. Shanstrom, District Judge Presiding

Submitted February 2, 1994**
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a) and Ninth Circuit Rule 34-4.

Before: WRIGHT, REAVLEY,*** and LEAVY, Circuit Judges.

Appellants (the custodians) claim that the General Services Administration (GSA) and one of its regional administrators misled them in the course of their employment with the Government, and terminated their employment in violation of their constitutional rights. They brought this action in federal district court, seeking mandamus, injunctive and monetary relief. The complaint does not assert claims under a federal statute which expressly creates a private cause of action for federal employees who have an employment dispute with the Government. Instead, the claims can be characterized as Bivens-type constitutional claims. We agree with the district court that such claims are not cognizable in federal district court in light of the Civil Service Reform Act (CSRA).

*** Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

This court has consistently held that federal civil service employment disputes cannot be brought originally in federal district court, but must instead be resolved under the comprehensive administrative scheme created by the CSRA. "Congress' purpose in enacting the CSRA was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies, subject to judicial review." Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991). We have held that the CSRA has provisions designed to protect civil servants from personnel practices which contravene their constitutional rights, and that Bivens-type claims asserting constitutional violations cannot be brought by federal employees in federal district court. Karamanos v. Egger, 882 F.2d 447, 451-53 (9th Cir. 1989)(holding that claim of improper job classification seeking mandamus and other relief precluded by CSRA); Kotarski v. Cooper, 866 F.2d 311, 312 (9th Cir. 1989)(holding that Bivens claim brought by probationary employee and alleging that demotion violated

privacy and free speech rights precluded by CSRA); Veit v. Heckler, 746 F.2d 508, 511 (9th Cir. 1984)(noting that "other circuits have held that the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all" and holding that "the federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere."). Recognition of congressional intent to create a uniform, balanced administrative scheme for review of federal personnel actions compels the conclusion that the CSRA precludes such federal district court actions, whether or not the CSRA provides the remedy sought by the federal employee. United States v. Fausto, 484 U.S. 439, 448, 455 (1988); Saul v. United States, 928 F.2d 829, 840 (9th Cir. 1991)(holding that "the CSRA precludes even those Bivens claims for which the act prescribes no alternative remedy.").

The GSA classified the custodians as temporary employees. The rights of temporary employees are limited under the CSRA.[1] Nevertheless, such employees are covered by the CSRA and are afforded some rights to challenge personnel actions.[2] Based on the authorities

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1 Chapter 43 of the CSRA covers agency action against civil servants based on unacceptable job performance. An agency can terminate or reduce in grade a civil servant under this Chapter provided that certain notice and hearing procedures are followed, and the employee has a right to appeal the agency decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. § 4303. However, this chapter excludes employees serving under temporary appointments. Id. § 4303(f)(2). Chapter 75 covers suspensions, terminations and other adverse actions taken against civil servants to "promote the efficiency of the service." Id. §§ 7503(a), 7513(a). Suspensions of 14 days or less must be made in compliance with certain procedural safeguards. Id. § 7503. More serious personnel actions, including terminations, may be appealed to the MSPB. Id. § 7513(d). Chapter 75 does not apply to temporary employees. Id. §§ 7501(1), 7511(a)(1)(A)(ii).

2 Temporary employees are covered by Chapter 23 of the CSRA. Chapter 23 forbids "prohibited personnel practices." 5 U.S.C. § 2302(a)(1). Such practices include "personnel action" in violation of any law, rule or regulation directly concerning the "merit system principles." Id. § 2302(b)(11). "Personnel action" includes any personnel action with respect to an employee in or applicant for a "covered position." Id. § 2302(a)(2)(A). A covered position includes any position in the "competitive service." Id. § 2302(a)(2)(B). The "competitive service" includes all employees in the civil service except for certain excepted employees such as those requiring Senate confirmation. Id. § 2102. The "merit system principles" are an extremely broad set of principles.

cited above, the custodians' claims cannot be brought in federal district court and were properly dismissed. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989)(en banc), cert. denied, 498 U.S. 957 (1990), is distinguishable because that case involved a plaintiff who was a member of the armed forces, which is excluded entirely from the CSRA. See 5 U.S.C. § 2101 (defining civil service).

AFFIRMED.

They include the principles that "[a]ll employees and applicants for employment should receive fair and equitable treatment . . . with proper regard for their privacy and constitutional rights," that "[e]qual pay should be provided for equal value," that "[e]mployees should be retained on the basis of the adequacy of their performance," and that employees should be protected from "arbitrary action." Id. § 2301(b)(2),(3),(6),(8). The Office of Special Counsel (OSC) is directed to receive and investigate allegations of prohibited personnel practices. Id. § 1214(a)(1)(A). The OSC is authorized to bring actions before the MSPB to correct prohibited personnel practices. Id. § 1214(b)(2)(B).

(3)

FILED
MAY 23 1994
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No. 93-1478

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD G. ANDERSON, ET AL., PETITIONERS

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARC RICHMAN
CAROL FEDERIGHI
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

4 pp

QUESTIONS PRESENTED*

1. Whether (in No. 93-1468) the Civil Service Reform Act of 1978, as amended, precludes an action brought by petitioners in district court to seek redress for their termination from federal employment.

2. Whether (in No. 93-1478) the Merit Systems Protection Board properly dismissed petitioners' appeal of their termination on the ground that they were hired as temporary employees.

3. Whether (in both cases) petitioners' failure to find either a judicial forum or an administrative forum for review of the merits of their claims based on termination of their federal employment violates the Due Process Clause of the Constitution.

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* Petitioners have filed two petitions for certiorari (Nos. 93-1468 and 93-1478) seeking review of decisions in two actions that arose out of the same events. The response in No. 93-1468 addresses both petitions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 12 F.3d 1069. The opinion of the Merit Systems Protection Board (Pet. App. 12-20) is reported at 56 M.S.P.R. 316.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1993. The petition for a writ of certiorari was filed on March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The present petition raises the same issues as those in the petition for a writ of certiorari to the

United States Court of Appeals for the Ninth Circuit (No. 93-1468), filed by petitioners in a closely related case.** These two petitions should be considered together; the petitions contain identical Statement, Argument, and Conclusion sections. We discuss the merits of both petitions in the brief in opposition filed in No. 93-1468. The Court is referred to that brief for a discussion of the petition in this case.

CONCLUSION

For the reasons stated in the response filed in No. 93-1468, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARC RICHMAN
CAROL FEDERIGHI
Attorneys

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** The appendix to the present petition also includes the decisions in the related case, specifically, the unreported opinion of the Ninth Circuit (Pet. App. 38-43) and the unreported opinions of the District Court for the District of Montana (Pet. App. 21-34, 35-37).